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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 638

ARGUS HOSIERY MILLS, INC., PETITIONER,

VS.

RENSO ROBERTSON, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

and

BRIEF IN SUPPORT THEREOF.

RUSSELL R. KRAMER,
Attorney for Petitioner.

CHARLES E. MCNABB,
J. W. BAKER,
POORE, KRAMER & COX,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Argus Hosiery Mills, Inc., which was the appellee in the above styled cause in the Circuit Court of Appeals for the Sixth Circuit, respectfully shows to Your Honors:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is an action brought by respondent, an employee of petitioner, against petitioner, in the United States District Court for the Eastern District of Tennessee, for the purpose of recovering back wages and damages resulting from an alleged violation of the Fair Labor Standards Act of 1938 (Ch. 676, 52 Stat. 1060; U. S. C., Tit. 29, Sec. 201, *et seq.*), the suit being brought pursuant to the provisions of Section 16 (b) of said Act.[1]

Respondent averred that from October 24, 1938, until a date just prior to the filing of the complaint he had been employed in petitioner's hosiery factory at Sevierville, Tennessee, and that petitioner in the conduct of its business produced goods for interstate commerce.[2]

While respondent alleged in his complaint that the action was brought not only for himself, but on behalf of approximately 140 other employees similarly situated, that is, producers of hosiery at petitioner's factory located at Sevierville, Tennessee, respondent did not name any of such other employees, nor did he specify the number of hours worked by, or amounts claimed to be due, such employees.[3]

The complaint alleged further that the amount sought by this respondent and all other employees similarly situated was in excess of three thousand dollars ($3,000), exclusive of court costs and attorney's fees. The maximum amount which could be recovered by respondent under the allegations of the complaint, however, was less than that sum, it being actually eight hundred seven and 46/100 Dollars ($807.46).[4]

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[1]Record p. 1.

[2]Record p. 2.

[3]Record pp. 3-4.

[4]Record pp. 2-3.

Petitioner moved to dismiss the complaint on the ground that although the matter in controversy arose under a law of the United States, the court lacked jurisdiction because the amount in controversy was less than three thousand dollars ($3,000), exclusive of interest and costs.[5]

Petitioner's motion to dismiss was sustained by the trial court, the respondent's motion to strike said motion to dismiss being overruled,[6] and a memorandum opinion was filed thereon.[7]

Respondent filed a petition to rehear, contending that the court had jurisdiction to determine the controversy irrespective of the amount involved, because; 1) the matters complained of arose under a law of the United States regulating commerce, and, hence, the district court had jurisdiction under U. S. C., Tit. 28, Sec. 41 (8); and (2) the recovery sought was in effect the enforcement of a penalty provided for by the Fair Labor Standards Act of 1938 and, therefore, the district court had jurisdiction under U. S. C., Tit. 28, Sec. 41 (9).[8]

The trial court denied respondent's petition to rehear[9] and filed a memorandum opinion thereon.[10]

The case was taken by the appeal of respondent to the United States Circuit Court of Appeals for the Sixth Circuit on the theory that the district court had erred in overruling respondent's petition to rehear.[11]

Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, filed a

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[5]Record p. 6.

[6]Record p. 9.

[7]Record p. 7.

[8]Record p. 10.

[9]Record p. 11.

[10]Record p. 12.

[11]Record pp. 14, 15, 16, 17.

brief in the Circuit Court of Appeals as *amicus curiae*, but only in support of the first ground of respondent's petition to rehear.

In an opinion rendered by the Circuit Court of Appeals on June 25, 1941, at the conclusion of which the judgment of the lower court was reversed and the case remanded for further proceedings, it was held that while the district courts of the United States do not have jurisdiction of employees' suits under the Fair Labor Standards Act of 1938 (Ch. 676, 52 Stat. 1060; U. S. C., Tit. 29, Sec. 201 *et seq.*) for their unpaid wages and an additional equal amount as liquidated damages, on the theory that such suits are for the enforcement of penalties incurred under a law of the United States, yet the district courts do have jurisdiction of such suits because they arise under a law regulating commerce within the meaning of U. S. C., Tit. 28, Sec. 41 (8).[12] The court held that it was unnecessary to consider whether in representative suits under the Fair Labor Standards Act of 1938 the claims of two or more employees could be added to attain the jurisdictional amount of more than three thousand dollars ($3,000) exclusive of interest and costs.[13]

II.

THE BASIS UPON WHICH THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

This Court has jurisdiction to consider and grant this petition pursuant to *Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938, U. S. C., Tit. 28, Sec. 347.*

The judgment of the Circuit Court of Appeals for the Sixth Circuit which is sought to be reviewed was rendered June 25, 1941.[14]

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[12]Record pp. 21, 22, 23.

[13]Record p. 23.

[14]Record p. 20.

III.

THE QUESTIONS PRESENTED.

1. Do the district courts of the United States have jurisdiction of employees' suits brought under Section 16 (b) of the Fair Labor Standards Act of 1938 (Ch. 676, 52 Stat. 1060; U. S. C., Tit. 29, Sec. 201 *et seq.*) for their unpaid minimum wages, or their unpaid overtime compensation, or both, as the case may be, and an additional equal amount as liquidated damages, upon the theory that such suits arise under a law regulating commerce, and, therefore, fall within U. S. C., Tit. 28, Sec. 41 (8)?

2. In representative suits brought pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938 (Ch. 676, 52 Stat. 1060; U. S. C., Tit. 29, Sec. 201 *et seq.*) may the claims of two or more of the employees be added to attain the jurisdictional amount of more than three thousand dollars ($3,000), exclusive of interest and costs?

IV.

THE REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

1. The questions involved in this case are questions of Federal law which have not been, but should be, settled by this Court.

2. It is vitally necessary that the jurisdiction of the district courts of the United States be declared with reference to employees' suits brought under Section 16 (b) of the Fair Labor Standards Act of 1938 (Ch. 676, 52 Stat. 1060; U. S. C., Tit. 29, Sec. 201 *et seq.*) in order to still the confusion which now exists among the courts on that question.

3. The decision of the Circuit Court of Appeals is a departure from the strict construction which this Court has always given the familiar statute (U. S. C., Tit. 28, Sec. 41) which governs the jurisdiction of district courts of the United States.

4. The decision of the Circuit Court of Appeals is contrary to the intent of the Congress in providing that employees' suits for back wages and damages under the Fair Labor Standards Act of 1938 "may be maintained in any court of competent jurisdiction" (Sec. 16 (b), Ch. 676, 52 Stat. 1060; U. S. C., Tit. 29, Sec. 201 *et seq.*). This decision would allow removal of such suits, no matter how small, from the state forum chosen by the employee to a distant district court of the United States.

5. There is a conflict and confusion among the decisions of the district courts on the question of removability of cases instituted in the state courts for collection of minimum wages or overtime compensation due because of the provisions of the Fair Labor Standards Act of 1938.[15]

V.

In his complaint, the respondent Robertson did not aver that he was engaged in commerce or in the production of goods for commerce, and thus failed to state a cause of action under the Fair Labor Standards Act of 1938.

VI.

Wherefore, your petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Sixth Circuit, demanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals for the Sixth Circuit had in the said case therein entitled, *Renso Robertson, appellant,* v. *Argus Hosiery Mills, Inc., appellee,*" to the end that this cause may be reviewed and deter-

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[15]See **Ricciardi v. Lazzera Pk. Corp.**, D. C. N. J., 1940, 32 F. Supp. 956, where court held such suit is removable and **Wingate v. General Auto Sales Co.**, D. C. W. D. Mo., Aug., 1941, ... F. Supp. ....., where court held such suit is not removable.

mined by this Court as provided by the statutes of the United States; and that the judgment herein of the said Circuit Court of Appeals be reversed by this Court.

Petitioner prays for such other relief as this Court may deem proper.

Dated September 22, 1941.

Argus Hosiery Mills, Inc.,
By RUSSELL R. KRAMER,
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Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

ARGUS HOSIERY MILLS, INC., PETITIONER,

VS.

RENSO ROBERTSON, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF THE COURTS BELOW.

The opinion of the United States District Court for the Eastern District of Tennessee is published in 32 Fed. Supp. 19. The opinion of the United States Circuit Court of Appeals for the Sixth Circuit is published in 121 F. 2d 285.

II.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The statutory provision which it is believed sustains the jurisdiction of this Court is Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938; U. S. C., Tit. 28, Sec. 347.

III.

STATEMENT OF THE CASE.

The facts are succinctly stated in the Petition for Writ of Certiorari and will not be repeated here. What is said therein is adopted and made a part of this brief.

IV.

SPECIFICATION OF ERRORS.

Petitioner respectfully insists that the Circuit Court of Appeals erred:

1. In reversing the decision of the district court which held that district courts of the United States do not have jurisdiction of employees' suits brought pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938 (Ch. 676, 52 Stat. 1060; U. S. C., Tit. 29, Sec. 201 *et seq.*), for unpaid minimum wages or unpaid overtime compensation or both, as the case may be, and an additional equal amount as liquidated damages. The decision of the district court was based upon the theory that such suits do not arise under a law regulating commerce and, therefore, do not fall within U. S. C., Tit. 28, Sec. 41 (8). With this conclusion the Circuit Court of Appeals did not agree.

2. In failing to hold that in representative suits brought pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938 (Ch. 676, 52 Stat. 1060; U. S. C., Tit. 29, Sec. 201 *et seq.*), claims of two or more of the employees cannot be added to attain the jurisdictional amount of more than three thousand dollars ($3,000), requisite under Section 1 (a) of the Jurisdictional Statute (U. S. C., Tit. 28, Sec. 41 (1-a)).

V.

GENERAL STATEMENT.

There is no specific grant in the Fair Labor Standards Act of 1938 of jurisdiction to the United States district courts to determine controversies arising under the act for unpaid minimum wages and/or unpaid overtime compensation, and an additional amount as liquidated damages. The act merely provides that action to recover such liability may be maintained in any court of competent jurisdiction.

The pertinent portion of the act, Section 16 (b), reads as follows:

> "Any employer who violates the provisions of Section 6 or Section 7 of this Act shall be liable to the employee or employees affected, in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."
>
> U. S. C., Tit. 29, Sec. 216.

The inescapable inference which is drawn from reading the act as a whole is that the United States district courts have jurisdiction of such controversies only where it is vested in them by some other jurisdictional statute. Of certain other matters arising under the Act, the Act itself gives jurisdiction to the district courts. Thus, Section 17 of the Act provides:

> "The district courts of the United States and the United States courts of the territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of Section 20 (relating to notice to opposite party) of the Act entitled, 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, as amended (U. S. C., 1934 Ed., Tit. 28, Sec. 381), to restrain violations of Section 15."
>
> U. S. C., Tit. 29, Sec. 217 (b).

Noticeably absent, however, is any specific provision of the statute granting jurisdiction to the federal courts to determine controversies for the recovery of back wages regardless of the amount involved.

It would seem clear, therefore, that in cases where a recovery of unpaid minimum wages and the liquidated damages incidental thereto is sought, jurisdiction of the United States district courts will be dependent upon the regular jurisdictional statutes applicable to any proceeding originally brought in the federal courts, and in cases where such jurisdictional requisites are absent employees must proceed in the state courts.

The legislative history of the Fair Labor Standards Act of 1938 (Ch. 676, 52 Stat. 1060; U. S. C., Tit. 29, Sec. 201 *et seq.*) removes any doubt that the jurisdiction of the United States district courts in these cases is dependent upon the regular jurisdictional statutes found in U. S. C., Tit. 28, Sec. 41, and that such jurisdiction is not conferred by the provisions of the act itself. Section

26 of the Bills as originally introduced in the House,[16] and in the Senate,[17] expressly provided that the district courts of the United States should have concurrent jurisdiction with the state courts over all suits instituted under the Fair Labor Standards Act of 1938. The report of the conference committee,[18] which recommended the enactment of Section 16 (b) of the Act as it reads today, recommended that the section of the Senate Bill above referred to which conferred jurisdiction upon the district courts of the United States of all suits arising under the Fair Labor Standards Act of 1938 be abandoned. A similar section in the House Bill had been eliminated prior to such bill's being referred to the conference committee.

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[16](H. R. 7200, 75th Cong., 1st Sess., 1937.)

[17](S. 2475, 75th Cong., 1st Sess., 1937.)

[18](P. 9247, Congressional Record, Vol. 83, Part 8.)

VI.

ARGUMENT.

PROPOSITION No. 1.

The Fair Labor Standards Act of 1938 (Ch. 676, 52 Stat. 1060; U. S. C., Tit. 29, Sec. 201, et seq.) is not a "law regulating commerce, within the meaning of U. S. C., Tit. 28, Sec. 41 (8), which provides that the district courts shall have original jurisdiction,

> **(8) Of all suits and proceedings arising under any law regulating commerce.**

Hence, jurisdiction was not conferred upon the district courts by this section.

That Congress had the power to enact the Fair Labor Standards Act of 1938 (Ch. 676, 52 Stat. 1060; U. S. C., Tit. 29, Sec. 201 *et seq.*) under the commerce clause of the Constitution is not questioned. However, there is a vast difference between the extent of the power granted to Congress under Art. I, Sec. 8, of the Constitution and the jurisdiction vested in the district courts under the section of the Judicial Code quoted above.

From the time of the decision rendered in *Gibbons* v. *Ogden*, 9 Wheat. 1, 196, 6 L. Ed. 23, down to the most recent pronouncement of this Court involving the commerce clause, that clause has been given a broad construction. It is probably true that the construction of this clause has broadened some during these later years, but even as far back as *Gibbons* v. *Ogden* we find the courts saying that the power of Congress under the commerce clause is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution."

In the recent case of *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 36, 81 L. Ed. 893, 911, this Court said:

> "The fundamental principle is that the power to regulate commerce is the power to enact 'all appropriate legislation' for 'its protection and advancement'; to adopt measures 'to promote its growth and insure its safety; to foster, protect, control and restrain.' * * * Although activities may be intrastate in character when separately considered, if they have such close substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions Congress cannot be denied the power to exercise that control."

In sustaining the constitutionality of the Fair Labor Standards Act of 1938, this Court, in the case of *United States* v. *F. W. Darby Lumber Co. et al.*, (Feb. 3, 1941) ..... U. S. ....., 85 L. Ed. 395, 402, 403, said:

> "*The power of Congress over interstate commerce is not confined to the regulation of commerce among the states.* It extends to those activities, intrastate, which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.
>
> * * * * * * *
>
> "But it does not follow that Congress may not by appropriate legislation *regulate intrastate activities* where they have a substantial effect on interstate commerce" (Italics ours).

It is readily apparent that under the commerce clause of the Constitution, as construed by this Court, the Congress has the power to regulate commerce itself with foreign nations and among the several states, and that it also has authority to regulate those activities which, though intrastate in character, have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect interstate or foreign commerce from burdens and obstructions.

A statute may, therefore, be constitutional under the commerce clause of the Constitution and yet not be a law regulating interstate commerce, being merely one which regulates intrastate activities directly and substantially affecting interstate commerce. The Fair Labor Standards Act of 1938 is unquestionably such a statute.

The manufacturing of hosiery—the work performed by the respondent in the case at bar—is not commerce, for, as the Circuit Court of Appeals for the Sixth Circuit said in *Gable* v. *Vonnegut Machinery Co. et al.*, 274 Fed. 66, "manufacturing is not commerce."

In *Anderson* v. *Shipowners Assn.*, 272 U. S. 359, 364, 71 L. Ed. 298, 301, this Court said:

> "Neither the making of goods nor the mining of coal is commerce; and the fact that the things produced are afterwards shipped or used in interstate commerce does not make their production a part of it."

The recent decisions of this Court holding that the National Labor Relations Act and the Fair Labor Standards Act of 1938 are constitutional are not at variance with the earlier pronouncements of this and other courts to the effect that manufacturing is not commerce. These later decisions merely hold that Congress has the power to regulate intrastate activities which may, or do, directly affect interstate commerce.

In striking contrast with the broad construction that the courts give to the commerce clause is the narrow construction given to the provisions of the Judicial Code conferring jurisdiction on the federal district courts.

It is true that under Art. III, Sec. 2, Cl. 1, of the Constitution, Congress is given the authority to extend broad judicial power to the district courts, but that provision of the Constitution is not self-executing, nor automatically operative.

In the early case of *Turner* v. *Bank of North America*, 4th Dall. 10, 1 L. Ed. 719, Justice Chase said:

> "The notion has frequently been entertained that the federal courts derive their judicial power immediately from the Constitution; but the political truth is that the disposal of the judicial power (except in a few specified instances) belongs to Congress. If Congress has given the power to this court, we possess it, not otherwise; and if Congress has not given the power to us, or to any other court, it still remains at the legislative disposal. Besides, Congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the federal courts, to every subject in every form, which the Constitution might warrant."

This principle has never been departed from.

There is neither a clear nor a necessary implication that Congress, in enacting the jurisdictional statute, U. S. C., Tit. 28, Sec. 41 (8), intended to bring within its scope all suits based upon statutes later enacted by it under the commerce clause of the Constitution. In fact, at the time this jurisdictional statute was enacted Congress had not entered the field of legislative power under which it regulated intrastate activities. To determine whether jurisdiction is vested by that statute an inquiry must be made in each case to ascertain whether the statute regulates interstate commerce or regulates purely intrastate activities which have a substantial effect on interstate commerce.

The Fair Labor Standards Act of 1938 may be properly termed social legislation. Such legislation of necessity must be enacted by the Congress due to the hesitance of the State legislative bodies to enter such a field of legislation and due, further, to the desirability of having this type of legislation uniform among the states. It will be conceded, petitioner believes, that while Congress relied upon a broad construction of the commerce clause of the Constitution for its grant of power to enact the Fair Labor Standards Act of 1938, the purpose of the Act is not to regulate interstate commerce, but is to secure

for employees in American industry a proper standard of living. In Section 16 (b) of the Act the Congress made provision for the institution of proceedings by individuals protected by the Act to procure for themselves sums due to them from their employers in order to bring their wages to the level prescribed by the Congress. These suits do not involve in any sense questions dealing with the flow of goods among the states—vital questions which should be determined by the federal courts pursuant to the jurisdictional statute in question, regardless of the amount involved—but involve, rather, simple questions of debt. The jurisdictional statute in question was undoubtedly intended by Congress to be limited to suits arising under laws similar to those which regulated commerce at the time the jurisdictional statute was enacted. The type of suits which should be tried by the federal courts without regard to the amount involved under the jurisdictional statute must be governed by the reason for the enactment of the jurisdictional statute—the desirability and propriety, as well as necessity, that the federal courts try all suits which involve the actual flow of goods in interstate commerce.

Respondent contends that *Mulford* v. *Smith,* (1938) 307 U. S. 38, 83 L. Ed. 1092, supports his contention that the district court had jurisdiction of his suit because it was one brought under a law regulating commerce. That suit was brought under the Agricultural Adjustment Act in a state court by a group of tobacco farmers against tobacco warehousemen for the purpose of enjoining the deduction by the latter from the amounts due plaintiffs certain penalties prescribed by the Act. The Act provided that where a tobacco farmer raised more tobacco than the quota allowed him by the Secretary of Agriculture the warehouseman who markets the tobacco in interstate commerce should deduct a certain penalty and pay it to the Secretary of Agriculture. Plaintiffs took the position that the act was unconstitutional. The case was

removed to the federal district court. The relief sought by plaintiffs was denied, the Act being held constitutional. This Court, in commenting upon the question of jurisdiction of the district court, said:

> "Before coming to the merits we inquire whether the court below had jurisdiction as a federal court or as a court of equity. Though no diversity of citizenship is alleged, nor is any amount in controversy asserted so as to confer jurisdiction under Subsection (1) of Paragraph 24 of the Judicial Code, the case falls within Subsection (8) which confers jurisdiction upon district courts 'of all suits and proceedings arising under any law regulating commerce.'
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> * * * * * * *
>
> "The statute does not purport to control production. It sets no limit upon the acreage which may be planted or produced and imposes no penalty for the planting and producing of tobacco in excess of the marketing quota. It purports to be solely a regulation of interstate commerce, which it reaches and affects at the throat where tobacco enters the stream of commerce—the marketing warehouse."

To state the proposition differently, in the Mulford case this court merely held that the district court had jurisdiction because the Agricultural Adjustment Act was a direct regulation of interstate commerce itself, in as much as it reached out and grasped the product at the instant it entered the stream—the warehouse. It is apparent that if the Act had regulated production only, this court would not have upheld the district court's jurisdiction.

The Mulford case thus refutes rather than sustains the respondent's contention. The reasoning by which this court determined that the district court had jurisdiction under U. S. C., Tit. 28, Sec. 41 (8), cannot possibly apply to the Fair Labor Standards Act of 1938, which seeks to regulate not commerce, but industry, industry which affects commerce, but which industry no one will contend constitutes commerce itself.

The other cases relied upon by respondent as authority to support his contention merely follow the rule reaffirmed in *Mulford* v. *Smith, supra;* namely, that where a federal statute regulates commerce, controversies arising thereunder are cognizable by the federal courts by virtue of U. S. C., Tit. 28, Sec. 41 (8), without regard to the amount involved. That principle is not in dispute; the question here is whether or not the Fair Labor Standards Act of 1938 is within that principle. We know of no case, and counsel for respondent have cited none, which holds that a controversy arising under a federal statute which regulates intrastate activities is cognizable by the federal courts without regard to the amount involved.

In the brief filed in the Circuit Court of Appeals on behalf of Honorable Philip B. Fleming, Administrator of the Wage and Hour Division, as *amicus curiae*, the statement is made that federal courts have consistently held that the Fair Labor Standards Act of 1938 is a regulation of commerce. In support of this statement the case of *Opp Cotton Mills, Inc.,* v. *Administrator of Wage & Hour Division,* 111 F. 2d 23, and a number of district court cases are cited.[19] We most earnestly insist that in none of these cases has this question been presented to the court. The cases referred to do hold that the enactment of the Fair Labor Standards Act of 1938 was a valid exercise of the power granted to Congress under the commerce clause of the Constitution—a holding concerning which we make no criticism—*they do not hold that the Fair Labor Standards Act of* 1938 *is an Act regulating commerce within the meaning of Subsec.* 8 *of Sec. of Tit.* 28, *U. S. C.* The same is true of the *Second Employers' Liability Cases,* 223 U. S. 1; *Texas and Pac. R. R. Co.* v. *Rigsby,* 241 U. S. 33, and *Chattanooga Foundry & Pipe Works* v. *City of Atlanta,* 203 U. S. 390. In relying upon such cases

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[19]**Andrews v. Montgomery Ward & Co., Inc.,** (N. D., Ill.) 30 F. Supp. 380; **United States v. Walters Lumber Co. et al.,** (S. D. Fla.) 32 F. Supp. 65, and others.

counsel seem to have overlooked the distinction between the power of Congress under the commerce clause of the Constitution and the jurisdiction which has been granted to the district courts under the Judicial Code.

Some district courts have held that they have jurisdiction in suits of this type because they arise under a law regulating commerce within the meaning of the statute above referred to.[20] However, in none of these cases does the court appear to have given consideration to the difference between the construction of the commerce clause of the Constitution and the proper construction of jurisdictional provisions of the Judicial Code. In some of these cases the district courts give no reason at all for sustaining the jurisdiction, while in others they content themselves by a mere reference to the commerce clause of the Constitution.

Under the decision of the Circuit Court of Appeals in the instant case the district courts have original jurisdiction of suits brought by employees to recover wage benefits under the Fair Labor Standards Act of 1938, regardless of how small are the amounts involved. These smaller suits will, in the majority of cases, be instituted by employees in the forums most convenient to them—the state courts. U. S. C., Tit. 28, Sec. 71, provides as follows:

> "Any suit of a civil nature, at law or in equity, arising under the constitution or laws of the United States or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction in any state court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district * * *."

Since the employers may thus remove to the federal courts the suits instituted in the state courts, such em-

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[20]**Fishman v. Marcouse,** (E. D. Pa.) 32 F. Supp. 460; **Lengel v. Newark Newsdealers Supply Co.,** (D. N. J.) 32 F. Supp. 567; **Campbell v. Superior Decalcomania Co., Inc.,** (N. D. Tex.) 31 F. Supp. 663, and other cases.

ployees will be deprived of the right to prosecute their suits for back wages, *et cetera,* under the Fair Labor Standards Act in the forums of their choice and can be made to do so in courts which will usually be far distant from their homes and which, due to the lengthy terms of such courts, will not be able to grant expeditiously the relief sought. Furthermore, the employees will be caused to expend added sums by the removal of their suits, sums which they can ill afford to pay.

At least one district court has attempted to protect employees from this far-reaching result of the Circuit Court of Appeals' decision. In the case of *Wingate* v. *General Auto Sales Co.,* (D. C. W. D. Mo., Aug. 5, 1941, ... Fed. Supp. ....), the court held that a suit brought by an employee in a state court to recover back wages under the Fair Labor Standards Act of 1938 cannot be removed to a federal court, where such suit involves less than three thousand dollars ($3,000) exclusive of interest and costs. The court said in the course of its opinion:

> "The amounts involved usually are small, the places in which federal courts are held are few. They are only to be found in the larger cities. If it was not intended that state courts should have jurisdiction of these cases, then Congress made this act of slight value to working men, who might easily bring suit in a Justice's court or other state court in the neighborhood in which they live, but who if they had to go to some distant city to prosecute the case would, in effect, be prohibited from seeking any remedy. It was on account of such reasons that the language, 'any court of competent jurisdiction' was used."

The court assigned as the reason for its decision against removability of the plaintiff's suit to the district court that "any action to recover liability under the act may be maintained in any court of competent jurisdiction, that is to say, it is not a removable case."

It is difficult to find within the provisions of the Fair Labor Standards Act an intent on the part of Con-

gress to limit the defendant's right of removal under U. S. C., Tit. 28, Sec. 71, according to the decision of the Wingate case. In any event, there is no uniformity among the decisions on this point.[21] Even should the Wingate decision be correct in its limitation of the defendant's right of removal, there can be no reason for that court's denying the right of removal only where less than three thousand dollars ($3,000) exclusive of interest and costs is involved. According to the theory of the court in the Wingate case *any* employee's suit brought under the Fair Labor Standards Act of 1938 in a state court cannot be removed to a federal court, regardless of the amount involved.

It is respectfully submitted that in order to provide for employees the full rights guaranteed to them by this Act; in order to protect the well established rules governing the right of removal under U. S. C., Tit. 28, Sec. 71; and in order to insure sound decisions of the courts in their attempts to protect employees in the securing of their rights under this Act, the decision of the Circuit Court of Appeals must be reversed. Should this be done, suits arising under the Act and involving small amounts can be brought in the state courts without fear of removal and the suits arising under the Act and involving more than three thousand dollars ($3,000) can be brought in the federal courts (U. S. C., Tit. 28, Sec. 41 (1-a)). This, we believe, will carry out the intent of the Congress as expressed in the language of the Act which provides that such suits may be brought in "any court of competent jurisdiction."[22]

As shown by some of the cases referred to above, much confusion exists among the district courts on this

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[21](See **Ricciardi v. Lazzera Pk. Corp.**, D. C. N. J., 1940, 32 F. Supp. 956, where the court held that Congress had not indicated within the Fair Labor Standards Act of 1938 an intention to qualify the Removal Act.)

[22]See Section 16 (b), Fair Labor Standards Act of 1938.

question of jurisdiction. The question is now before this Court for the first time, and should be determined so that the confusion will be eliminated.

PROPOSITION No. 2.

In representative suits under the Fair Labor Standards Act of 1938 the claims of two or more of the employees may not be added to attain the jurisdictional amount of more than three thousand dollars ($3,000). Hence jurisdiction is not vested in the district courts by virtue of U. S. C., Tit. 28, Sec. 41 (1-a).

The only statute granting to the United States district courts jurisdiction to determine controversies for the recovery of back wages and the liquidated damages incidental thereto arising under Sections 6 and 7 of the Fair Labor Standards Act of 1938 is found in U. S. C., Tit. 28, Sec 41 (1). The pertinent provision of this familiar jurisdictional statute is:

> "The district courts of the United States shall have original jurisdiction as follows:
>
> "(1) United States as plaintiff; *civil suits at common law or in equity.* First. Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and cost, the sum or value of three thousand dollars ($3,000), and
>
> "(a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made under their authority, * * *"

The complaint discloses that respondent seeks to recover for himself the sum of eight hundred seven and 46/100 dollars ($807.46) this amount being less than the minimum of more than three thousand dollars ($3,000) necessary to sustain the jurisdiction of the United States District Court. Respondent brings this suit on behalf of himself and all other employees similarly situated seeking to add their claims to his own for the purpose of satis-

fying the jurisdictional amount which is requisite. However, each of these claims is a separate and distinct one.

This Court has repeatedly held that where the claims of a group of persons are separate and distinct such claims can not be added together to make up the jurisdictional amount. The amount of each such claim furnishes the jurisdictional test.

The principle was applied in *Seaver* v. *Bigelows*, (1867) 72 U. S. 208, 18 L. Ed. 595. Two judgment creditors sought to aggregate their claims for the purpose of obtaining federal jurisdiction of a suit to compel satisfaction of their claims against their mutual debtor. The trial court ruled that their claims could not be added together for that purpose and plaintiffs appealed. This Court dismissed the appeal for lack of jurisdiction, saying:

> "The judgment creditors who have joined in this bill have separate and distinct interests, depending upon separate and distinct judgments. In no event could the sum in dispute, of either party, exceed the amount of their judgment, which is less than $2,000. The bill being dismissed, each fails in obtaining payment of his demands. If it had been sustained, and a decree rendered in their favor, it would only have been for the amount of the judgment of each * * *. It is true the litigation involves a common fund, which exceeds the sum of $2,000, but neither of the judgment creditors has any interest in it exceeding the amount of his judgment. Hence, to sustain an appeal in this class of cases, where separate and distinct interests are in dispute, of an amount less than the statute requires, and where the joinder of parties if permitted by the mere indulgence of the court, for its convenience and to save expense, would be giving a privilege to the parties not common to other litigants, and which is forbidden by law."

In *Clay* v. *Field*, (1891) 138 U. S. 464, 31 L. Ed. 1044, this Court said:

> "The general principle observed in all is that, if several persons be joined in a suit in equity or

admiralty, and have a common and undivided interest, though separable as between themselves, the amount of their joint claim or liability will be the test of jurisdiction; but where their interests are distinct, and they are joined for the sake of convenience only, and because they form a class of parties whose right or liabilities arose out of the same transaction, or have relation to a common fund or mass of property sought to be administered, such distinct demands or liabilities cannot be aggregated for the purpose of giving this court jurisdiction by appeal, but each must stand or fall by itself alone."

In *Elliott* v. *Empire Natural Gas Co.*, (1925) 4 F. 2d 493, it was stated by this Court that:

> "Where the right (the value of which is taken as the test) exists in favor of many persons as against one, or in favor of one as against many, and in its nature is separable, then the separable values cannot be added together to make the jurisdictional sum, and the separable value furnishes the jurisdictional test."

Respondent's claim is separable and distinct from those claims of the other employees on whose behalf he brings this suit. He can obtain only the amount due himself. He would have no possible right, claim or control over the sums alleged to be due the others—not even to the extent of holding such recovery for distribution to them. He claims no assignment from any of them. We, therefore, respectfully insist that respondent's effort to aggregate his claim with those of his fellow employees is expressly contrary to the law as cited in the foregoing authorities.

It is possible that where the aggregate sum claimed by a group of employees exceeds three thousand dollars ($3,000), but the separate items claimed by the individual employees are less than that figure, federal jurisdiction over the controversy could be obtained by the simple expedient of each employee's assigning the amount alleged to be due him to a designated one for the purposes of suit,

each worker to have a proportionate share of any possible recovery. Diversity of citizenship would not be necessary in such cases, the jurisdictional amount of more than three thousand dollars ($3,000) being under the only requisite inasmuch as the suit would be one arising under the laws of the United States. However, that question is not presented in this case.

Perhaps before concluding this argument it should be pointed out that the respondent Robertson fails to allege in his complaint facts sufficient to show that he is engaged in commerce or the production of goods for commerce, although he bases his alleged cause of action upon Sections 6 and 7 of the Fair Labor Standards Act of 1938 (Ch. 676, 52 Stat. 1060; U. S. C., 29, Secs. 206 and 207). These sections are expressly limited to employees who are engaged in commerce or in the production of goods for commerce.

Hence, the respondent has failed to allege a cause of action and his suit must be dismissed for this additional reason.[23]

It is respectfully submitted that the decision of the Circuit Court of Appeals is erroneous, and that this suit is one calling for the exercise by this Court of its supervisory powers, by granting a Writ of Certiorari and after reviewing said decision, reversing it to the extent of the errors hereinbefore shown.

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J. W. BAKER,
POORE, KRAMER & COX,
Of Counsel.

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[23]**Bagby v. Cleveland Wrecking Co.**, (W. D. Ky.) 28 F. Supp. 271; **Gates v. Graham Ice Cream Co.**, (D. Neb.) 31 F. Supp. 854; **Foster v. National Biscuit Co.**, (W. D. Wash.) 31 F. Supp. 552; **Wood v. Central Sand & Gravel Co.**, (W. D. Tenn.) 33 F. Supp. 40.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 638.

ARGUS HOSIERY MILLS, INC., - - - Petitioner,

versus

RENSO ROBERTSON, - - - - - Respondent.

REPLY BRIEF IN BEHALF OF RESPONDENT FILED TO THE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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HERBERT G. B. KING,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No._____

ARGUS HOSIERY MILLS, INC., - - - *Petitioner,*

v.

RENSO ROBERTSON, - - - - - *Respondent.*

REPLY BRIEF IN BEHALF OF RESPONDENT FILED TO THE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

REPLY TO PETITIONER'S PROPOSITION No. 1.

The petitioner, by proposition No. 1,[1] attempts to draw a distinction between the jurisdiction conferred by Congress on United States District Courts and powers conferred on Congress by the Constitution, with reference to the regulation of commerce, and wants this Court to hold that the "Fair Labor Standards Act of 1938" regulates activities in a zone in which Congress may legislate, but which the United States District Courts cannot adjudicate.

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[1]Petitioner's Brief, page 14.

The petitioner attempts to support this proposition upon the theory that the Constitution is liberally construed by the Courts, but the Judicial Code conferring jurisdiction upon the District Courts is strictly construed.

The rights sought to be enforced in this suit are created by the "Fair Labor Standards Act of 1938." In such suits jurisdiction is conferred upon courts of "competent jurisdiction,"[2] which under the Judicial Code[3] includes a United States District Court.

The pertinent part of Section 16 (b) of the Fair Labor Standards Act is as follows:

> "* * * action to recover such liability may be maintained in any Court of competent jurisdiction * * *."

The United States Constitution, Article I, Section 8, clause 3, says:

> "The Congress shall have power * * * to regulate commerce * * * among the states * * *."

The United States Judicial Code, Section 24, says:

> "The District Courts shall have original jurisdiction as follows:
>
> * * * * * *
>
> "(8) All suits and proceedings arising under any law regulating commerce * * *."
>
> *U. S. C., Title 28*, Sec. 41, Subsec. 8.

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[2]Section 16(b), Fair Labor Standards Act of 1938. U. S. C., Title 29, Section 216(b).

[3]Judicial Code, Section 24(8).

The Constitution and the Judicial Code used the same words in granting power to Congress and in conferring jurisdiction on the District Courts, the only difference being the tense of the verb "regulate."

Section 2 of the "Fair Labor Standards Act of 1938" is as follows:

> "(a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetrate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.
>
> "(b) It is hereby declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power. June 25, 1938, c. 676, Section 2. 52 Stat. 1060."

U. S. C. A., Title 29, Sec. 202.

The foregoing quotation says the purpose of the Act is to regulate commerce.

The Circuit Court of Appeals held the Act was a regulation of commerce, saying:[4]

> "The express purpose of the statute is to regulate commerce among the several states through the elimination of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of the workers."

The "Fair Labor Standards Act of 1938" has been held to apply to an intrastate manufacturing business which substantially affects interstate commerce, because said Labor Act is a regulation of the kind of interstate commerce about which the Constitution grants to Congress the power to legislate.

U. S. v. *F. W. Darby Lumber Co.*, 312 U. S. 100, 85 L. Ed. 395, 61 S. Ct. 451.

The Judicial Code confers jurisdiction upon the United States District Courts to entertain suits involving rights under a United States statute which regulates the kind of interstate commerce about which the Constitution grants to Congress the power to regulate. The Judicial Code does not limit the categories of activities affecting interstate commerce in conferring jurisdiction on United States District Courts.

The Judicial Code does not limit the jurisdiction of the District Courts to matters involving the flow of

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[4]Record, page 22.

interstate commerce. The activities about which Congress can legislate and about which the District Courts may adjudicate do not have to be a part of the flow of interstate commerce.

The words in the Judicial Code "any law regulating commerce" would seem to be broad enough to include the adjudication of rights under a statute which involves activities substantially affecting interstate commerce.

The meaning of the words "any law regulating commerce" as used in the Judicial Code does not have a more narrow meaning than the words "to regulate commerce" as used in the Constitution because of the relationship in which these terms are used in the Judicial Code and the Constitution respectively.

Assuming that there is a different rule of construction, but not conceding this, a different rule of construction with reference to the Constitution and the statutes conferring jurisdiction on District Courts is not sufficient to show a different meaning of the same identical words. Counsel cites no authority for this proposition. Counsel does not point out, even with a strict construction of the statute, the principle to apply in holding that an activity affecting commerce, held to be regulating commerce, and, therefore, an activity about which Congress may legislate would also permit the courts to hold the rights under that Act did not arise under a law regulating commerce.

No authority, and we insist no good reason, has been advanced to indicate that Congress intended, in giving

jurisdiction to the District Courts, to limit that jurisdiction to a part of the activities affecting interstate commerce, and thus leave the enforcement of part of the activities regulating interstate commerce with the State Courts, involving forty-eight jurisdictions and interpretations.

THE JUDICIAL CODE, SECTION 24 (8) AS AMENDED, HAS BEEN HELD TO CONFER JURISDICTION UPON DISTRICT COURTS OF ALL SUITS ARISING UNDER THE LAWS OF THE UNITED STATES REGULATING COMMERCE.

Turner, Dennis & Lowery Lumber Co. v. *Chicago, M. & St. Rr. Co.,* 271 U. S. 259;
Mulford v. *Smith,* 307 U. S. 38, 57 S. Ct. 97.

THE UNITED STATES DISTRICT COURTS HAVE TAKEN JURISDICTION OF CONTROVERSIES INVOLVING THE "FAIR LABOR STANDARDS ACT OF 1938" BECAUSE IT IS A LAW REGULATING COMMERCE.

United States District Courts have held that the Fair Labor Standards Act is a regulating of interstate commerce, and that such Courts have jurisdiction under the Judicial Code, Section 24 (8), as amended, with the lone exception of the case at bar.

Campbell v. *Superior Decalcomania Inc.,* 31 F. Supp. 663;
Honore v. *Porto Rican Express Co.,* 32 F. Supp. 567;
Fishman v. *Marcouse,* 32 F. Supp. 460;

Lengel v. *The Newark News Dealers Supply Co.*, 32 F. Supp. 567;
Rogers v. *Glazier*, 32 F. Supp. 990;
Martin v. *Lane Oil and Gas Co.*, 36 F. Supp. 252;
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Berger v. *Clouser*, 36 F. Supp. 168;
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Stucker v. *Roselle*, 37 F. Supp. 864;
Townsend v. *Boston M. & Rr.*, 35 F. Supp. 938;
Farr v. *Smith Detective Agency and Night Watch Service*, 38 F. Supp. 105.

In the Fishman case, *supra*, the Court said:

"The Fair Labor Standards Act of 1938 is a law of the United States regulating commerce and the instant case is a suit or proceeding under that law. I, therefore, find that this Court has jurisdiction regardless of the citizenship of the parties and the amount involved."

In the Townsend case, *supra*, the Court said:

"Whenever a statute, enacted pursuant to the power of Congress to regulate interstate commerce, grants a right of property or of action and suit is brought to enforce that right, such a suit arises under the law creating the right within the meaning of the statute defining jurisdiction of the Federal Courts."

In the Farr case, *supra*, the Court said:

"I conceive this statute to be directed exclusively and wholly at interstate commerce, and the

national Courts are given jurisdiction over such controversies regardless of the amount involved."

The Sixth Circuit Court of Appeals, in deciding this case, said:

> "Assuming, but not deciding, that the statute conferring jurisdiction upon Federal Courts is construed more strictly than the commerce clause of the Constitution, Article I, Section 8, the fact remains that this action falls within the precise terms of Section 41, Subsection 8, Title 28, U. S. C."[5]

The Mulford case, *supra,* holds that a right existing under an Act of Congress which puts a limitation on the sale of tobacco for interstate commerce may be enforced in a Federal Court by virtue of the Judicial Code, Section 24 (8) because it regulates an activity which affects commerce by preventing tobacco grown under certain conditions from entering the stream of interstate commerce. In the case at bar we insist that the Court should hold that a right existing under the Fair Labor Standards Act which prohibits the production of goods for commerce under certain conditions may be enforced in a Federal Court by virtue of the Judicial Code, because the Act regulates an activity which affects commerce by preventing certain goods from entering the stream of commerce.

WHETHER A SUIT INVOLVING THE "FAIR LABOR STANDARDS ACT OF 1938" IS REMOVABLE FROM A STATE COURT TO A FEDERAL

[5]Record, pages 22, 23.

COURT IS IMMATERIAL TO THE ISSUES INVOLVED IN THE PETITION IN THE CASE AT BAR.

The question in the case at bar does not concern the removability of similar suits, but concerns the question as to whether or not a court of "competent jurisdiction" includes a United States District Court under the Judicial Code, Section 24 (8) as amended. If Congress had intended to give jurisdiction to suits involving under $3,000.00 to the State Courts exclusively and to the Federal Courts exclusively suits involving more than $3,000.00, undoubtedly Congress would have so said. Evidently Congress intended that the employees might choose the forum and institute the suit in the court which was most convenient. If employees were forced to bring suits involving less than $3,000.00 in the State Court and more than $3,000.00 in the Federal Court the employee would have no choice.

REPLY TO PETITIONER'S PROPOSITION No. 2.

By proposition No. 2,[6] the petitioner asked to have this Court hold that in a representative suit under the Fair Labor Standards Act the sum of two or more claims of the employees amounting to more than $3,000.00 does not give jurisdiction to the United States District Court under the Judicial Code, Section 24 (1) (a).

Petitioner, in order to support this proposition, insists that the claims of the employees are separate and

[6]Petitioner's Brief, page 24.

distinct, and that the claims of separate and distinct individuals cannot be added in order to confer jurisdiction.

This Court has held where the plaintiff holds title to the claims, even though as trustee, that the suing plaintiff may consider the aggregate value of the claims in order to establish jurisdiction in the United States District Courts. The title to the claims was held by an assignment in trust to the plaintiff.

Bullard v. *Cisco,* 290 U. S. 177, 54 S. Ct. 179.

The cases cited by petitioner,[7] holding that the aggregate of separate and distinct claims cannot be added in order to confer jurisdiction on the Federal Courts, do not seem to be in point, because in the suit at bar the right of the plaintiff to sue for other employees similarly situated is a right created by the statute.

This is not a case where several parties holding claims under $3,000.00 combine together in a suit for the purpose of making the claim of sufficient amount to confer jurisdiction in the Federal Courts. In the case at bar Congress combined the claims of all the employees, at least for the purpose of prosecuting the suit to a judgment. The decree in favor of the plaintiff should be in his name and all other employees similarly situated, and later each may establish the amount of his individual claim. The claims of all are combined for the purpose of obtaining a judgment. The final judgment will be the total amount payable by the de-

[7]Petitioner's Brief, pages 25, 26.

fendant to the suing employee and those for whom he sues.

Under Section 24 1-a of the Judicial Code,[8] jurisdiction is conferred if "the matter in controversy exceeds $3,000.00." The matter in controversy is the amount of the judgment against the defendant which the suing employee may obtain for himself and other employees similarly situated. The amount in controversy is the amount due the employees. Congress, in the Act, by providing that one employee might sue for himself and all others, combined the claims of all employees so far as to make the total due all employees as the amount in controversy.

REPLY TO THE CONCLUDING ARGUMENT OF PETITIONER'S BRIEF.[9]

The question as to whether the complaint alleges that the suing employee and those for whom he sues are engaged in interstate commerce or the production of goods for interstate commerce was not raised by the petitioner in the trial Court.[10]

This question was not called to the attention of the Circuit Court of Appeals.[11]

Neither the Circuit Court of Appeals nor the trial Court will be reversed upon a question which was not called to their attention.

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[8]Copied in Petitioner's Brief, page 24.
[9]Petitioner's Brief, page 27.
[10]See Motion to Dismiss Action in Trial Court, Record, page 6.
See Trial Court's Opinion, Record, page 7.
See Petition to Rehear, Record, page 10.
See Trial Court's Opinion on Petition to Rehear, Record, page 12.
[11]See Opinion Circuit Court of Appeals, Record, page 21.

Even though the petition should contain an allegation that the suing employee and those for whom he sues are engaged in commerce or in the production of goods for commerce, the suing employee is entitled to amend his complaint. This amendment could be made upon the remand to the trial Court. Whether such an allegation was made does not affect the questions presented to this Court.[12]

It is respectfully submitted that the decision of the Circuit Court of Appeals is correct, and that the petition for a writ of *certiorari* should be denied.

W. O. Lowe,
Attorney for Respondent.

Herbert G. B. King,
Of Counsel.

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[12]See Petitioner's Specification of Errors, Record, pages 10, 11.